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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/828,143	03/24/1997	HOUN SIMON HSIA	24400-101	4526

7590

07/22/2003

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EXAMINER

MARX, IRENE

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 07/22/2003

33

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application N .

08/828,143

Applicant(s)

HSIA, HOUN SIMON

Examiner

Irene Marx

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 03 July 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 36-42 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 36-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 7/3/03 has been entered.

Claims 36-42 are being examined on the merits. Claims 9-11 remain withdrawn from consideration as directed to a non-elected invention.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 36-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pena Mecho *et al.* (U.S. Patent No. 3,243,299) taken with Cajigas, of record.

The claims are directed to a composition comprising dried viable *Lactobacillus*, dead Brewer's or Baker's yeast and soy, whey or animal protein concentrate in a sealed container.

The cited reference discloses a composition comprising dried viable *Lactobacillus*, dead Brewer's or Baker's yeast and soy protein concentrate which appears to be identical to the presently claimed composition (See, e.g., col. 5 and 6) since the material contains about 11.3 % yeast in Formula II concentrate. The reference recognizes that the added yeast aids in the growth

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of *Lactobacillus* and additionally that the composition has health benefits as a nutritional supplement.

The reference differs from the claimed invention in that it is silent as to placement in a sealed container. However the formulation is clearly suitable for storage in a sealed container, as suggested by the teachings of Cajigas (See, e.g., col. 8, lines 11-15). For storage purposes, the bulk composition of Pena Mecho *et al.* may be stored as is in a sealed container or may be divided into smaller portions for the sake of convenience and for distribution by placing in sealed containers such as sacks, jars or barrels, for example.

The referenced composition also may differ from the claimed invention in that the amount of *Lactobacillus* appears to be less than the amount required in claims 38 and 39 and the amount of protein concentrate is less than that required in claim 42. However, Cajigas recommends that the amount of *Lactobacillus* be up to 5% (Col. 3, lines 41-47). In addition, it would have been within the ordinary skill in this art to adjust the amounts of *Lactobacillus*, yeast and protein to maximize the benefits of the composition depending on the specifically targeted subject, with respect to therapeutic, dietetic or food requirements.

Therefore, it would have been obvious to one having ordinary skill in the art at the time the claimed invention was made to modify the composition of Pena Mecho *et al.* by placing it in one or more sealed containers as taught by Cajigas, and further by adjusting the respective concentrations of *Lactobacillus*, yeast and protein according to the specific needs of the particular subject to be fed or treated, for the expected benefit of maximizing the therapeutic, health and nutritional effects of the *Lactobacillus*, yeast and protein concentrate composition.

Thus, the claimed invention as a whole was clearly *prima facie* obvious, especially in the absence of evidence to the contrary.

Applicants' arguments are moot in view of the new grounds of rejection.

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (703) 308-2922. The examiner can normally be reached on Monday through Friday from 6:30 AM to 3:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn, can be reached on (703) 308-4743. The appropriate fax phone

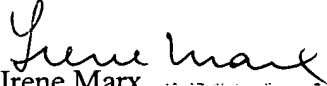
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number for the organization where this application or proceeding is assigned is before final (703) 872-9306 and after final, (703) 872-9307.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to Customer Service whose telephone number is (703) 308-0198 or the receptionist whose telephone number is (703) 308-1235.

  
Irene Marx  
Primary Examiner  
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